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Supreme Court of the United States.

ORIGINAL. OCTOBER TERM, 1904. No. 15.

In Re COMMONWEALTH OF MASSACHUSETTS,
PETITIONER.

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS.

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Supreme Court of the United States.

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STATEMENT OF THE CASE.

Congress, on the twenty-seventh day of April, 1904, appropriated $1,611,740.85 to the Commonwealth of Massachusetts on account of the Commonwealth's expenses in defence of the Union. The Secretary of the Treasury, Leslie M. Shaw, drew a warrant for that sum, payable to the Governor of Massachusetts or order, and delivered it to John B. Cotton of Washington, D. C., who claimed to be entitled to receive from the Commonwealth of Massachusetts 10 per cent. of that amount, under a contract with Massachusetts whereby he was made its agent and attorney to present, prosecute and endeavor to recover before the Court of Claims, the Supreme Court of the United States and the Treasury Department of the United States, the claim of Massachusetts upon which that appropriation was based. This delivery was without notice to any one else represent-

ing Massachusetts, although only the Governor was authorized to receive payment of the warrant. John B. Cotton, claiming a lien on the fund appropriated and on the warrant for 10 per cent. of that amount, refused to turn over the warrant to the Governor until his claim should first be satisfied. The Governor demanded a duplicate warrant, but the Secretary of the Treasury refused to issue one, taking the position that his duty permitted him to assist a claim agent to coerce his client into settling all questions that might arise between them, at the agent's own terms. Upon the Governor's request, however, he took the opinion of the Attorney-General of the United States in the matter, and was advised that his delivery of the warrant to John B. Cotton was unauthorized by law, and that to pay the appropriation he might issue a duplicate warrant and deliver it to the Governor.

A copy of the Attorney-General's opinion is annexed to this brief, marked "A."

The day after the date of the Attorney-General's opinion, and before the Governor of Massachusetts was advised of it, and before the Secretary of the Treasury could issue a new warrant, John B. Cotton filed in the Supreme Court of the District of Columbia a bill in equity, in which the Secretary of the Treasury and the Governor of Massachusetts were named as defendants, setting forth his contract with the Commonwealth of Massachusetts, and asserting that he was entitled to enforce a lien upon the original warrant in his possession by perpetually restraining the Secretary of the Treasury from issuing a second warrant to the Governor or any one else in behalf of Massachusetts, and restraining the Governor of Massachusetts from asking or receiving one. At once the Supreme Court of the District of Columbia issued a rule commanding the parties named as defendants to show cause why they should not be thus enjoined. No

service upon the Governor of Massachusetts was made or attempted. Neither he nor the Commonwealth of Massachusetts has appeared in the suit. Upon the return day of the rule, Nov. 22, 1904, the hearing thereon was indefinitely postponed. This equity suit is still pending.

To remove the unlawful restraint upon the Secretary's conduct, effected by the action of the Supreme Court of the District of Columbia in taking jurisdiction of the equity suit, this petition is brought.

Argument.

I.

The Supreme Court of the District of Columbia has no Jurisdiction of John B. Cotton's Bill in Equity, and the Lack of Jurisdiction appears on the Face of the Bill.

The bill asserts a right in the plaintiff under a contract with Massachusetts to be paid by the State $161,174.09. Fearing that the State may have some defences to offer to his claim, and recognizing that he cannot garnish the funds in the treasury appropriated to Massachusetts, the plaintiff clings to the warrant which was delivered to him, and asserts the power to restrain the treasury department from paying the appropriation in any way except by cashing that particular warrant, which he refuses to give up to the only person who has authority to receive the cash for it.

The only standing which he asserts is based upon this contract, the other party to which is not John L. Bates, named as defendant in his suit, but the Commonwealth of Massachusetts.

The real and only party having an interest in the question whether the contract gives John B. Cotton any rights is the Commonwealth of Massachusetts.

The only tribunal in which any rights growing out of the contract may be adjudicated at the suit of John B. Cotton is the Superior Court of Massachusetts, where alone the Commonwealth has consented to be impleaded.

Eleventh Amendment to the United States Constitution.
Revised Laws of Massachusetts, c. 201.

The pending bill in equity is a suit against the State. Further, it is a suit in which the State is an indispensable party, without whose presence no decree between the other parties can be made, yet whose presence at the bar of the Supreme Court of the District of Columbia cannot be compelled.

Mathews, J., in *Hagood* v. *Southern*, 117 U. S. 52, 71, said: —

> The court cannot proceed to the determination of a cause and controversy to which the State is an indispensable party, without its presence.

In *Cunningham* v. *Macon & Brunswick R.R. Co.*, 109 U. S. 446, Miller, J., said: —

> Since a State cannot be sued without its consent, whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction.

The point we raise is one of jurisdiction in the true sense of the term, not one as to the proper exercise of jurisdiction.

A federal court of equity has no jurisdiction in a suit by A against X, based on A's alleged rights under his executory contract with a State. It has no "power to hear and determine the subject-matter in controversy between the

parties, to adjudicate or exercise any judicial power over them." (Baldwin, J., in *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 718.) Judge Baldwin said, in *Grignon's Lessee* v. *Astor*, 2 How. 338: —

> This is the line which denotes jurisdiction and its exercise; in cases *in personam*, where there are adverse parties, the court must have power over the subject-matter and the parties.

Even were the other party to this contract an individual who could not be made a party to the bill, instead of a State, jurisdiction would be lacking.

In *Mallow* v. *Hinde*, 12 Wheat. 193, the plaintiffs, claiming a right to land by virtue of executory contracts concerning a survey, sought to enjoin the defendant, who held a government patent to the land, from obtaining judgments against them in ejectment suits. A decree of the Circuit Court dismissing the bill was affirmed, on the ground that any decree upon the plaintiffs' rights under those contracts, the validity and obligation of which the parties to them had a right to contest, without hearing the parties to them, would be "contrary to all the rules which govern courts of equity, and against the principles of natural justice."

See also *Findley* v. *Hinde*, 1 Pet. 241, 246.
Shields v. *Barrow*, 17 How. 130.
Barney v. *Baltimore*, 6 Wall. 280.

In *Florida* v. *Georgia*, 17 How. 478, 507, 508, Curtis, J., by way of illustration, said: —

> Take the case of a suit between a citizen of Florida and a citizen of Georgia, in the course of which it appears that an inhabitant of this district who is not competent to sue, or capable of being sued, has such an interest in the controversy that the court can make no decree between the parties before them without affecting

that interest; has it ever been supposed that there was any implied power granted by the Constitution and the eleventh section of the Judiciary Act of 1789 to make him a party, or has the conclusion been that in all such cases the court cannot act at all? The latter, I apprehend, is the settled conclusion.

In *Ribon* v. *Railroad Cos.*, 16 Wall. 446, it is said: —

The rule in equity as to parties defendant is that all whose interests will be affected by the decree sought to be obtained must be before the court; and, if any such persons cannot be reached by process, — do not voluntarily appear, or, from a jurisdictional objection going to the person in the courts of the United States, cannot be made parties, — the bill must be dismissed. Where a decree can be made as to those present, without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and of those absent are inseparable, the obstacle is insuperable.

The provisions of the Revised Statutes of the United States, section 738, do not displace the above fundamental principle of jurisprudence.

Gregory v. *Stetson*, 133 U. S. 579, 586.

In this case Mr. Justice Lamar said: —

In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that the court cannot adjudicate directly upon a person's right without having him either actually or constructively before it. This principle is fundamental. . . . The point was made . . . that Mrs. Pike being a non-resident and beyond the jurisdiction of the court, it was impossible to join her as a party defendant to this suit, and that it was, therefore, unnecessary to attempt to do so. The court below ruled against the complainant on this point, and we see no

error in that ruling. The general question involved therein has been before this court a number of times, and it is now well settled that, notwithstanding the statute referred to (Rev. Sts., §738), and the forty-seventh equity rule, a Circuit Court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby. (*Shields* v. *Barrow*, 17 How. 130, 141, 142; *Coiron* v. *Millaudon*, 19 How. 113, 115, and cases there cited.)

In *California* v. *Southern Pacific Railroad Co.*, 157 U. S. 229, 249, *et seq.*, the chief justice, dismissing an original bill for want of parties who ought to be joined but could not be joined without ousting the jurisdiction of the court, said: —

It was held, *Mallow* v. *Hinde*, 12 Wheaton, 193, 198, that where an equity cause may be finally decided between the parties litigant without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with in the Circuit Court if its process cannot reach them, or if they are citizens of another State; but if the rights of those not before the court are inseparably connected with the claim of the parties litigant, so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the Circuit Court forms no ground for dispensing with such parties. And the court remarked: "We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must apply equally to all courts of equity, whatever may be their structure as to jurisdiction. We put it upon the ground that no court can adjudicate directly upon a person's right without the party being actually or constructively before the court."

Mr. Justice Harlan, dissenting, in the same case stated the effect of the court's decision as follows: —

Upon that ground alone it is held that we are without jurisdiction to pass a final decree as between the State and the defendant corporation.

The question which we raise is not "Has John B. Cotton shown a right to the relief which he seeks?" but "Has the federal court authority to determine whether or not he has shown such a right?" In maintaining the negative we have satisfied one test that the difficulty is jurisdictional.

People v. *Sturtevant*, 9 N. Y. 263, 269.

Then, too, any decree of the Supreme Court of the District of Columbia upon this bill could be collaterally attacked as void. Suppose that court should enjoin the Secretary of the Treasury from paying the appropriation by a duplicate warrant, and should enjoin John L. Bates from asking or receiving such warrant; the Commonwealth of Massachusetts could then compel its issuance by a writ of mandamus from this court; and if the Supreme Court of the District of Columbia should commit both Mr. Shaw and Mr. Bates for contempt, they would be entitled to writs of habeas corpus.

These suggestions make it plain that the federal court's lack of power to decide even that John B. Cotton has a common law attorney's lien on the warrant, by virtue of his contract with Massachusetts, is lack of jurisdiction.

Any attempt to sustain the jurisdiction in such a case would subvert the very foundation on which the rule of equity requiring the joinder of the interested parties rests; for the decree would either have concluded, without a hearing, the interests of the only person really interested to contest it, or have delivered over the whole matter to new and independent litigation.

Story, Eq. Pl. § 83.

The necessity, in a bill of this nature, of having both parties to the contract before the court and subject to its

jurisdiction, is pointed out in *Price* v. *Forrest*, 173 U. S. 410, and in *Sanborn* v. *Maxwell*, 18 App. D. C. 245, 253.*

See also *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199.
Williams v. *Bankhead*, 19 Wall. 563.
Dodd v. *Una*, 40 N. J. Eq. 672, 709, 710–712.
Calvert, Parties in Equity, p. 10 *et seq.*
Daniell Chancery Practice (3d Amer. Ed.), pp. 285, 286.

Since the Supreme Court of the District of Columbia would have no jurisdiction of the bill were the other party to the contract an individual who could not be made a party to the suit, *à fortiori*, it has no jurisdiction when the other party is a State. If an indispensable party is lacking, who may come within the jurisdiction, it is proper to stay the suit, or dismiss the bill without prejudice; but if the indispensable party is a State, the court has no power to entertain the suit for any purpose.

The dictum in *Osborn* v. *Bank of United States*, 9 Wheaton 738, that a State is not a party within the prohibition of the Eleventh Amendment, unless it is a party on the record, and the twist given to that dictum by *Davis* v. *Gray*, 16 Wallace 203, to the effect that in an equity suit it is sufficient excuse for proceeding to a decree in the

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* The case of *McKee* v. *Lamon*, 159 U. S. 317, is not in point, because there it appeared that the Choctaw nation had, by resolve of its council, recognized the contract with its agent as valid, and had appropriated the amount of its agent's percentage fee thereunder, to the satisfaction of the contract obligation, and the whole percentage fee had been paid to one agent, although another was entitled to share in it. The controversy was solely between the two agents, and, as the court pointed out (page 322), the Choctaw nation had no longer any interest in the percentage fee.

absence of the State from the record, that it cannot be made a party, have no application to a suit where the State is the only real party against which a decree would effectively operate.

In re Ayers, 123 U. S. 443, 505, 506.

The classification of the cases upon the Eleventh Amendment has been so thoroughly made in *Pennoyer* v. *McConnaughy*, 140 U. S. 1, and *In re Tyler*, 149 U. S. 164, with the recent approval of the court in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, and *Tindal* v. *Wesley*, 167 U. S. 204, that argument seems unnecessary on the point that the present case comes within

Louisiana v. *Jumel*, 107 U. S. 711;
Cunningham v. *Macon & Brunswick R.R. Co.*, 109 U. S. 446;
Hagood v. *Southern*, 117 U. S. 52;
In re Ayers, 123 U. S. 443;
Christian v. *Atlantic & N. C. R. R. Co.*, 133 U. S. 233;
Belknap v. *Schild*, 161 U. S. 10;
Fitz v. *McGhee*, 172 U. S. 516;
Smith v. *Reeves*, 178 U. S. 436;
Minnesota v. *Hitchcock*, 185 U. S. 373;

and not within

United States v. *Peters*, 5 Cranch. 115.;
Osborn v. *Bank of United States*, 9 Wheat. 738;
Davis v. *Gray*, 16 Wall. 203;
Board of Liquidation v. *McComb*, 92 U. S. 531;
United States v. *Lee*, 106 U. S. 196;
Virginia Coupon Cases, 114 U. S. 270;
Pennoyer v. *McConnaughy*, 140 U. S. 1;
In re Tyler, 149 U. S. 164;

Reagan v. *Farmers' Loan & Trust Co.*, 154 U. S. 389;
Scott v. *Donald*, 165 U. S. 108;
Tindal v. *Wesley*, 167 U. S. 204;
Smyth v. *Ames*, 169 U. S. 517;
Illinois Central R.R. Co. v. *Adams*, 180 U. S. 28;
Missouri R.R. Co. v. *Missouri Railroad Commissioners*, 183 U. S. 53.

Since it is manifest upon the face of the bill that the defendant John L. Bates has no individual interest in the controversy, and that the relief sought against him is only in his official capacity as representing the Commonwealth of Massachusetts, which alone is to be affected by a decree and by the entertainment of the bill, the point that the suit is substantially against the State is not merely matter of defence, as in *Illinois Central R.R. Co.* v. *Adams*, 180 U. S. 28, but goes to the jurisdiction of the Supreme Court of the District of Columbia, and makes the restraint upon the Secretary's action, imposed by the pendency of the bill and the service upon him of the order to show cause, unlawful and void.

See especially *In re Ayers*, 123 U. S. 443, at 489.

II.

The Supreme Court of the District of Columbia having no Jurisdiction of the Subject-matter of the Bill, by Reason of the Exemption from Suit of an Indispensable Party, the Commonwealth's Remedy for the Usurpation of Jurisdiction is a Writ of Prohibition to the Judges of that Court.

It should be assumed, in favor of the Secretary of the Treasury, that when the obstruction created by the pendency of this bill is removed, he will at once issue the war-

rant demanded by Massachusetts, or in some other manner pay the appropriation. If he hesitates then, the Commonwealth will apply to this court, under its original jurisdiction of suits by a State against citizens of another State, for a writ of mandamus to compel him to pay it.

See *U. S. ex rel. Redfield* v. *Windham*, 137 U. S. 636. *Roberts* v. *U. S.*, 176 U. S. 221.

Of course the Commonwealth of Massachusetts might disregard any orders of the Supreme Court of the District of Columbia, and apply for such writ of mandamus at once. But it seems not an appropriate remedy to attack the Secretary, when the Supreme Court of the District of Columbia is the direct cause of the injury to the Commonwealth's right. The Commonwealth has no other remedy in the equity suit than to attack the jurisdiction of the court, whatever may be its remedies by independent proceedings in disregard of the equity suit.

If the Commonwealth of Massachusetts does nothing, and the Supreme Court of the District of Columbia, in the course of time, dismisses the plaintiff's bill, he will have an appeal to the Court of Appeals, and, after that, to this Court. Should the Supreme Court of the District of Columbia make a decree in conformity with the prayer of the bill, it might be that the Secretary of the Treasury would not feel himself aggrieved, and would not appeal.

It is to be noted that the able and experienced district attorney, of counsel for the Secretary of the Treasury, during all the time that intervened between the filing of the bill and the filing of this petition, offered no motions to strike the bill from the files or to dismiss it, but, so far as the record shows, seemed actually to take the bill seriously. Thus it appears that, if the Commonwealth does not move in the

case, this court may never have an opportunity to exercise its appellate jurisdiction.

The Commonwealth should not voluntarily appear in the suit, and plead to the merits. Even if its acquiescence would give the federal court a jurisdiction which is forbidden by the Eleventh Amendment (see *Clark* v. *Barnard*, 108 U. S. 436), no officer of Massachusetts has authority to consent that it be sued outside its own court.

U. S. v. *Lee*, 106 U. S. 196, 205.
Hagood v. *Southern*, 117 U. S. 52, 71.

A decree in favor of the Commonwealth on the merits would not be a bar to another suit by John B. Cotton in the only court of competent jurisdiction, — the Superior Court of Massachusetts.

It would be a waste of time for the Commonwealth to appear specially before the court of the district, and move to dismiss the suit as against both defendants for lack of jurisdiction. John B. Cotton would have his tedious appeals from a decree dismissing the bill, while from an order overruling its motion the Commonwealth would have no appeal.

Georgia v. *Jesup*, 106 U. S. 458.
South Carolina v. *Wesley*, 155 U. S. 542.

It cannot be law that a State which cannot be made a party before a federal court may have its right to immediate payment of an appropriation affected by such a suit as this, unless by a suggestion made to that very court it succeeds in getting the suit dismissed, and by compromising with the plaintiff prevails upon him to waive his appeal. See the remarks of Mathews, J., in *Hagood* v. *Southern*, 117 U. S. 52, as to the futility of arguing that the State has had opportunity to appear.

Such a suggestion is not necessary as a preliminary step before applying for a writ of prohibition, when the lack of jurisdiction appears on the face of the proceedings below.

This is decided upon an elaborate discussion of all prior English authorities in

Mayor and Aldermen of London v. *Cox*,
L. R., 2 H. L. 239, 275–292.

Judicial procedure in the United States would be liable to great reproach if it did not afford a prompt and effectual remedy at once to put an end to an action brought in violation of the Constitution of the United States, and of the universal principle by which all civilized countries are governed, that a sovereign can be sued only by its own consent.

The great delay attending the reversal in the usual way of a decree made without jurisdiction has been held in this court sufficient reason for resorting to an extraordinary remedy.

Gaines v. *Rugg*, 148 U. S. 228, 243.

Were this the Court of King's Bench in England, all the questions arising upon the petition would be concluded by authority of *In the Matter of Wadsworth and the Queen of Spain* and *In the Matter of De Haber and the Queen of Portugal*, 17 Q. B. 171. These were applications to the Queen's Bench for writs of prohibition to the Lord Mayor's Court of the city of London. One Wadsworth sued the Queen of Spain in the Lord Mayor's Court for interest on Spanish government bonds, and attached money of the Spanish government in the hands of London bankers, garnishees. De Haber sued the Queen of Portugal for money taken from him by the Portuguese government under a court decree, and attached funds of that government in the possession of London bankers, garnishees. In the case of the Queen of Spain, the garnishees applied for the writ of prohibition;

while the Queen of Portugal herself, without appearing before the Lord Mayor's Court for any purpose, applied for the writ.

It was argued against the rule to show cause, in substance as follows: —

Assuming that in some stage of the case the queen might interpose and allege something to defeat the action, a prohibition cannot go. The Lord Mayor's Court has jurisdiction in this kind of a proceeding. No application has been made to the Lord Mayor's Court, because the queen cannot be sued there. If the objection is taken on trial, the Lord Mayor's Court will deal with it and it may be brought before a court of error. The proper mode of defence on the part of the queen would have been to appear and put in a plea. The present question is not between the plaintiff and the queen, but between the plaintiff and the garnishee. The defendant cannot have a prohibition, for want of jurisdiction before appearing in the inferior court, and the garnishee, to take advantage of the objection, should plead it there. The prohibition will then go, if the inferior court refuse the plea, so as to show unequivocally an intention to exceed the jurisdiction.

At the close of the argument the Lord Chief Justice Lord Campbell, said (page 203): —

We will take time to consider our judgment. But without prejudice to any point which has been argued in this case, I must express very great regret that the action should have been brought. I have no hesitation in saying that such actions do not lie; and I am very sorry to find that this has been persisted in. The only question is as to the proper mode of stopping it, whether by a plea in the court below or by prohibition.

Application for prohibition was made April 15, 1851. Lord Campbell delivered the judgment of the court, making the rule absolute in both cases, May 28, 1851. The Lord Chief Justice said (page 207): —

An action cannot be maintained in any English court against a foreign potentate, for anything done or omitted to be done by him in his public capacity as representative of a nation of which he is the head; and that no English court has jurisdiction to entertain any complaints against him in that capacity. Redress for such complaints affecting a British subject is only to be obtained by the laws and tribunals of the country which the foreign potentate rules, or by the representations, remonstrances or acts of the British government. To cite a foreign potentate in a municipal court for any complaint against him in his public capacity is contrary to the law of nations, and an insult which he is entitled to resent.

(Page 214:) We have now to consider whether we can grant the prohibition on the application of the Queen of Portugal before she appears in the Lord Mayor's Court. . . . It would be very much to be lamented if, before doing justice to her, we were obliged to impose a condition upon her, which would be a further indignity and a further violation of the law of nations. If the rule were that the application for a prohibition can only be by the defendant after appearance, we should have had little scruple in making this an exception to the rule. But we find it laid down in books of the highest authority that, where the court to which the prohibition is to go has no jurisdiction, a prohibition may be granted upon the request of a stranger as well as of the defendant himself. . . . What has been done in this case, by the Lord Mayor's Court, must be considered as peculiarly in contempt of the Crown, it being an insult to an independent sovereign, giving that sovereign just cause of complaint to the British government, and having a tendency to bring about a misunderstanding between our own gracious Sovereign and her ally, the Queen of Portugal. Therefore, upon the information and complaint of the Queen of Portugal, either as the party grieved, or as a stranger, we think we are bound to correct the excess of jurisdiction brought to our notice, and to prohibit the Lord Mayor's Court from proceeding further in this suit.

(Page 219:) Judicial procedure in England would have been liable to great reproach had it not afforded a prompt and effectual remedy at once to put an end to actions brought in perversion of the ancient and laudable custom of foreign attachment in the city

of London, and in violation of the universal law by which all civilized nations are bound. It gives us great satisfaction, therefore, to be able, consistently with the decisions of our predecessors and the principles by which they have been guided, to grant the relief which is prayed. If we had entertained any grave doubt upon the subject, we should have directed the applicant to declare in prohibition; but, being clearly of opinion that there is an excess of jurisdiction in the court below, of which he is entitled to complain before us, it is our duty simply to make the rule absolute.

The principle of these cases is precisely the same as that of the present application. The suit which the Commonwealth seeks to prohibit is a perverted garnishment in which the plaintiff, by asserting a lien on the warrant, tries to tie up money due from the United States to the Commonwealth of Massachusetts.

In England nothing except the unwritten law of international comity denied to the Lord Mayor's Court jurisdiction of such suits against the property of an independent sovereign. Yet Justice Willes said of those two suits that the entertainment of them brought scandal upon the law of England. (*Mayor and Aldermen of London* v. *Cox*, L. R. 2 H. L. 239, at 267.) The Commonwealth of Massachusetts cannot apply to the State department and complain against this affront to its sovereignty in the courts of the District of Columbia, because when it came into the Union it yielded the right to deal thus with the diplomatic head of the District of Columbia. But, in return for the rights which it gave up, it received under the Constitution, according to its true interpretation, now secured by the Eleventh Amendment, protection of the right not to be made to suffer delay and outrage from the pendency of a suit against it, directly affecting its public funds, in a court of the District of Columbia. The only power which it can invoke is the power of the Supreme Court of the United States to de-

clare, and make its declaration promptly effective, that by no abuse of this assumed jurisdiction can the guaranteed right of a sovereign State be further delayed and obstructed.

III.

The Supreme Court of the United States has Power to issue the Writ of Prohibition to the Supreme Court of the District of Columbia, that being the Appropriate Remedy.

Probably this court has inherent power to issue the writ to restrain excesses of jurisdiction by inferior federal courts whose decrees are subject to its supervision. This valuable and ancient weapon ought not to be lacking to the judicial power of the United States. That this court has inherent powers cannot be doubted.

See *In re Vidal*, 179 U. S. 126.
Ex parte Joins, 191 U. S. 93.
Anderson v. *Dunn*, 6 Wheat. 204, 227.
Ex parte Robinson, 19 Wall. 505.

Express authority to issue the writ may be found in Rev. Sts., § 716: —

> The Supreme Court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

This statute has been construed by this court to intend, not the exclusion of power to issue such writs, unless they are necessary for the exercise of its appellate jurisdiction, but the grant of power to issue them when agreeable to the

usages and principles of law, as well as when necessary for the exercise of its jurisdiction.

See the opinion of the Chief Justice in *In re Chetwood*, 165 U. S. 443.

By section 14 of the Judiciary Act of Sept. 24, 1789 (1 Stat. 81, c. 20), carried forward as section 716 of the Revised Statutes, this court and the Circuit and District courts were empowered by Congress "to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law;" and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *American Construction Co.* v. *Jacksonville Railroad Co.*, 148 U. S. 372, 380. And, although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice. Tidd's Prac. *398; Bac. Ab., Certiorari.

Since the Chief Justice, in the later case of *In re Tampa Suburban Railway*, 168 U. S. 583, has hinted that the issuance of the writ in *Chetwood's case* was really because it was necessary for the exercise of the appellate jurisdiction of the Supreme Court, and since the only case in which the writ of prohibition has been held suitable to any court other than a district court sitting as a court of admiralty and maritime jurisdiction (*Bronson* v. *LaCrosse Railroad Co.*, 1 Wall. 405) may be put upon the same ground, it seems that it has never become necessary for this court to decide whether it may issue such a writ to an inferior federal court other than a district court whenever the writ is agreeable to the usages and principles of law as demonstrated in the Court of King's Bench in England.

In every case in this court where the remedy of prohibition has been denied, there has been a meritorious reason for denying it, without dealing with the court's power to issue it.

The cases, taking them up in chronological order, are as follows: —

Ex parte Christy, 3 How. 292 (1845): —

Petition for prohibition to the district court sitting as a court of bankruptcy. Denied, because the district court had jurisdiction of the case before it.

Ex parte Gordon, 1 Black, 503 (1861): —

Petition for prohibition to the circuit court in a capital case of piracy. Denied, because the circuit court had jurisdiction.

Bronson v. *LaCrosse Railroad Co.*, 1 Wall. 405 (1863): —

An appeal was taken to the Supreme Court of the United States from an order of a district court in an equity suit to foreclose a railroad mortgage. Notwithstanding the appeal, the district court proceeded to enforce the order. On application for the writ of prohibition the court withheld the writ, to give the lower court opportunity to desist in accordance with the opinion, leave being given counsel, however, to apply for the writ if necessary. Held, that the district court had no jurisdiction.

United States v. *Hoffman*, 4 Wall. 158 (1866): —

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because the application was made too late, the district court having already disposed of the case.

Ex parte Graham, 10 Wall. 541 (1870): —

Petition for prohibition to a district court which had taken jurisdiction of a proceeding *in rem* to confiscate real estate under the act of July 7, 1862, entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, etc." The act declared that such proceedings should be *in rem* and should conform as near as may be to proceedings in admiralty. Petition denied. The

court said that it had no authority to issue a writ of prohibition except to district courts when proceeding as courts of admiralty, thus disregarding *Bronson's case*, 1 Wall. 405; but it is apparent that under the statute the district court had jurisdiction of the proceeding *in rem*.

Ex parte Warmouth, 17 Wall. 64 (1872):—

Petition for prohibition to the circuit court in equity. This court had restrained one McEnery from acting as governor of Louisiana or setting up any claim to that office, upon a petition by his political adversary, who had received the next highest number of votes, brought under the statute of May 31, 1870 (16 Stat. at L. 140), an act to enforce the right of citizens of the United States to vote in the several States of this Union, and for other purposes. The petition was denied, because an appeal was the proper remedy, the court below being expressly given jurisdiction by the statute. The statute provided, in section 23, that when any person was deprived of his election to any office by reason of the denial to any citizen of his right to vote, on account of race, color or previous condition of servitude, he might bring any appropriate suit to recover possession of the office, in the circuit court of the United States, and provided that the circuit court should have, concurrently with the State court, jurisdiction thereof.

Ex parte Easton, 95 U. S. 68 (1877):—

Petition for prohibition to the district court sitting as a court of admiralty to restrain it from proceeding to enforce a lien for wharfage. Denied, because the district court had jurisdiction, the contract for wharfage being a maritime contract. Whether the lien existed was, therefore, a question for its determination.

Ex parte Gordon, 104 U. S. 515 (1881):—

Petition for prohibition to the district court sitting as a court of admiralty to restrain it from assessing damages for the death of a person, caused by maritime tort. Denied, because the district court had jurisdiction.

Ex parte Ferry Co., 104 U. S. 519 (1881):—

This case is similar to *Ex parte Gordon*, *supra*, except that the amount of damage assessed was too small for appeal.

Ex parte Hagar, 104 U. S. 520 (1881) : —

Petition for prohibition to the district court sitting as a court of admiralty. Denied, because that court had jurisdiction, the matter in dispute being a pilot's claim.

Ex parte Slayton, 105 U. S. 451 (1881) : —

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because the court had jurisdiction of a petition to limit liability.

Ex parte Pennsylvania, 109 U. S. 174 (1883) : —

This case is like *Ex parte Hagar*, *supra*.

Ex parte Boyer, 109 U. S. 629 (1884) : —

Petition for prohibition to the district court sitting as a court of admiralty. Denied, because that court had jurisdiction.

Chesapeake & Ohio Railroad Co. v. *White*, 111 U. S. 134 (1883) : —

Petition for prohibition "or such other proceeding as may be deemed appropriate" to a State court, and the plaintiffs therein, prohibiting them from further proceeding in a suit in which the petitioner was defendant, on the ground that the cause had been properly removed to the federal courts, and that the substantial rights of the parties were involved in a suit pending in the Supreme Court, namely, a writ of error to the highest State court, the Court of Appeals, which, by mandamus, had ordered the State court to proceed with the case. Petition denied in substantially the following language : —

Our proceedings in this suit must be confined to such as relate to a review of the judgment of the Court of Appeals and the enforcement of any order we may make upon the final hearing. The judgment of this court would not be a prohibition to the State court against proceeding, but only a refusal to order it to proceed. If a mandamus were refused by this court on the writ of error, the plaintiff below would not be guilty in law of contempt, if, notwithstanding refusal, he applied again to the State court to proceed to the trial. The State court did not abandon its jurisdiction. It still retained the suit. If a sufficient cause for removal was made in the State court, the rightful jurisdiction of that court is gone, and cannot properly

proceed further: but if it does proceed, and does force the defendant who applied for the removal to a trial, the remedy is by a writ of error after final judgment, and not by prohibition or punishment for contempt.

Ex parte Phenix Insurance Co., 118 U. S. 610 (1886): —

Petition for writ of prohibition to the district court sitting in admiralty to restrain it from taking further jurisdiction of a petition by the owner of a steam vessel for the trial of the question of his liability for damage caused to buildings on land, by fire set by sparks from the vessel's smokestack. The writ issued because the court had no jurisdiction, the tort not being a maritime tort. The court said: —

"The case is clearly one for a writ of prohibition, as the want of jurisdiction appears on the face of the proceedings."

In re Baiz, 135 U. S. 403 (1890): —

Petition for prohibition to the district court to restrain it from proceeding with a suit for libel against the petitioner, who claimed to be a public minister. Denied, after full consideration of the merits, the facts showing that the petitioner was not a public minister, because the court had jurisdiction against him.

In re Cooper, 138 U. S. 404 (1890): —

Petition for prohibition to a district court sitting as a court of admiralty. A rule was issued to show cause.

In re Garnett, 141 U. S. 1 (1890): —

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because the court had jurisdiction of a petition to limit liability for loss on the Savannah River.

In re Fassett, 142 U. S. 479 (1891): —

Petition for prohibition to a district court sitting as a court of admiralty. Denied, because that court had jurisdiction.

In re Cooper, 143 U. S. 472 (1891): —

This is the same case as *In re Cooper*, *supra*, heard upon the return of the rule to show cause. Petition denied, because the petitioner had an adequate remedy by appeal, which, through negligence, he had failed to secure. The district court had jurisdiction.

In re Engles, 146 U. S. 357 (1892) : —

This case is like *In re Fassett*, *supra*.

In re Morrison, 147 U. S. 14 (1892) : —

Petition for prohibition and mandamus. Both denied, — mandamus because the petitioner had an adequate remedy in the ordinary course; prohibition because the court below had jurisdiction. The suit was a libel to limit liability. The court said : —

"As the District Court of Massachusetts had jurisdiction in the premises, we will not prohibit it from proceeding in the exercise of such jurisdiction. A writ of prohibition would be issued only in case of a want of jurisdiction, either of the parties or of the subject-matter of the proceeding."

In re Rice, 155 U. S. 396 (1894) : —

Petition for a writ of prohibition to a circuit court to prohibit it from further proceeding upon a receiver's petition, and for a writ of mandamus directing the circuit judge to restore the parties to their original positions and thereafter to proceed according to law. The court decided the case upon the merits, without discussing the question of jurisdiction. Fuller, C. J. : —

"Without discussing the various matters urged upon our attention by counsel for the petitioner, it is sufficient to say that we are of opinion that the leave asked for cannot be granted.

"1. Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings. *Smith* v. *Whitney*, 116 U. S.

167, 173; *In re Cooper*, 143 U. S. 472, 495. Tested by these rules, we are clear that a proper case is not made for awarding the writ of prohibition."

In re New York, etc., Steamship Co., 155 U. S. 523 (1894):—
Petition for prohibition to a district court sitting as a court of admiralty. Denied, because that court had jurisdiction.

In re Alix, 166 U. S. 136 (1896):—
Petition for prohibition to a district court sitting as a court of admiralty, brought by an intervenor in a libel. Denied, under the test of the quotation in *Rice's case, supra.*

In re Hugulay Manufacturing Co., 184 U. S. 297 (1901):—
Petition for prohibition to a circuit court to restrain it from taking any further steps in a bill ancillary to a bill of foreclosure, and for mandamus requiring a circuit court to dismiss the bill. Fuller, C. J.:—

"It is firmly established that where it appears that a court, whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, a party who has objected to the jurisdiction at the outset, and has no other remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, the granting or refusal of the writ is discretionary. *In re Rice*, 155 U. S. 396. And that the writ of mandamus cannot be used to perform the office of an appeal or writ of error, and is only granted as a general rule where there is no other adequate remedy. *In re Atlantic City Railroad Company*, 164 U. S. 633.

"And it may be added that it is also the general rule as to the writ of certiorari, when sought as between private parties and on the ground that the proceedings below are void, that it will be granted or denied in the sound discretion of the court, and will be refused where there is a plain and adequate remedy by appeal or otherwise. *In re Tampa Suburban Railroad Company*, 168 U. S. 583.

"In this case there was under the act of Congress of June 6, 1900, 31 Stat. 660, c. 803, a plain and adequate remedy by

appeal to the Circuit Court of Appeals for the Fifth Circuit from the interlocutory order granting an injunction. After a final decree an appeal to this court would lie in respect of the jurisdiction if the question were properly raised and certified, or if issues were raised and decided bringing the case within section 5 of the act of March 3, 1891; or to the Circuit Court of Appeals. The case as presented is far from being one in which we should regard it as a proper exercise of our jurisdiction to interfere with the orderly progress of the suit below by the issue of either of the writs applied for. *In re New York and Porto Rico Steamship Company, Petitioner*, 155 U. S. 523, 531."

Ex parte Joins, 191 U. S. 93 (1903): —

Petition for prohibition and for a writ of certiorari in aid of the same, to the members of the Choctaw and Chickasaw Citizenship Court. Denied, because the cause in the Citizenship Court was ended before the present application was heard. Holmes, J.: —

"It is unnecessary to state the objections to the law more in detail, because we are of opinion that the writ must be denied, irrespective of these questions. We need not consider whether the jurisdiction of this court to grant a writ of prohibition to the district courts is confined to cases where those courts are 'proceeding as courts of admiralty and maritime jurisdiction.' Rev. Stat., § 688; *Ex parte The City Bank of New Orleans*, 3 How. 292, 322; *Ex parte Gordon*, 1 Black, 503; *Ex parte Graham*, 10 Wall. 541; *Ex parte Easton*, 95 U. S. 68. As to the jurisdiction in other cases, whether inherent or under Rev. Stat., section 716, see *In re Rice*, 155 U. S. 396; *In re Huguley Manufacturing Co.*, 184 U. S. 297; *In re Chetwood*, 165 U. S. 443, 462. Again, we need not consider whether the Citizenship Court is a court in such a sense as to be subject to prohibition. See *In re Vidal*, 179 U. S. 126; *Gordon* v. *United States*, 2 Wall. 561; *S. C.*, 117 U. S., 697, 702. However these things may be, it is clear that the writ will not issue after the cause is ended, and that the cause in the Citizenship Court was ended before the present application was heard."

It is insisted, in view of the elaborate discussion of these applications for prohibition in late years, that the dicta of the early cases, to the effect that the Supreme Court of the United States has no authority to issue a writ of prohibition except to a district court sitting as a court of admiralty, are not now to be regarded, and that this court has full authority to issue the writ whenever its issuance is agreeable to the usages and principles of law.

In the present case, however, it is unnecessary to invoke the power of this court to what we believe is its extent, for here the issuance of the writ is necessary for the exercise of its jurisdiction as a court of final appeal from the Supreme Court of the District of Columbia. (Act of Feb. 9, 1893, 27 Stat. 434.)

The latest discussion of Rev. Sts., § 716, known to us is found in

Barber Asphalt Paving Co. v. *Morris*, 132 Fed. 945.

The paving company sued the city of Duluth in the Circuit Court of the United States. The city council had already allowed its claim, but an appeal had been taken by taxpayers to the State Court. The judge of the Circuit Court stayed the paving company's suit until the final determination of the controversy in the State court. Thereupon the paving company applied to the Circuit Court of Appeals for a writ of mandamus, to compel the judge of the Circuit Court to try the case with all convenient speed. The writ was granted, after a carefully considered opinion by Judge Sanborn, overruling a prior decision of the same court and holding that in case of need the writ of mandamus, under authority of section 716, should issue in aid of a court's appellate jurisdiction whenever appellate jurisdiction exists, whether it has been invoked by appeal or not.

The opinion reviews all the decisions of the Supreme Court bearing upon this point, hence we rely upon it.

In the present case, the moment John B. Cotton's bill was filed, the power ultimately to review the proceedings in it became vested in this court, which in the exercise of its appellate jurisdiction had the power under section 716 to issue either mandamus or prohibition. If the court below has jurisdiction, and refuses to exercise it with reasonable diligence, mandamus will issue. If the court below has no jurisdiction, and assumes it, prohibition should issue. Suppose the court below should enjoin the Secretary of the Treasury, according to the prayer of the bill. It is conceivable that he, the only party having a right to appeal, might not choose to exercise it. It is more fitting that this state of affairs be remedied by prohibition in aid of this court's appellate jurisdiction, than by any mode of collateral attack.

It may, however, not be essential to determine whether this court's power to issue the writ to federal courts in general is inherent or derived from Rev. Sts., § 716. Since the common law has been adopted with respect to the District of Columbia, the highest court of appellate jurisdiction within the District has the same power over the inferior courts that the highest court of Maryland had, at the time of the creation of the District of Columbia, over its subordinate tribunals.

See *United States* v. *Schurz*, 102 U. S. 378.

At the time the District of Columbia was created, the highest court of Maryland had all the powers of the Court of King's Bench in England.

Runkel v. *Winemiller*, 4 Harris & M'Henry, 429, 449.

Price v. *State*, 8 Gill, 295, 310.

Kendall v. *United States*, 12 Peters, 524, 620, 631.

The common law of Maryland remained in force in the District of Columbia.

Kendall v. *United States*, 12 Peters, at pp. 614, 621.

The power of the proper tribunals in the District of Columbia to issue writs of prohibition has never been taken away by statute.

See *Smith* v. *Whitney*, 116 U. S. 167, at p. 175 (semble).
Deffer v. *Kimball*, 7 App. D. C. 499.

IV.

If this Court declines to issue a Writ of Prohibition, then the Petitioner's Only Remedy is a Writ of Mandamus to command the Judges of the Supreme Court of the District of Columbia to dismiss the Suit. Certiorari is desired, if necessary as an Auxiliary Writ.

It is elementary that mandamus is the proper remedy to require a court to assume jurisdiction of a case which properly belongs to it, or to decide a matter which is properly before it.

Hollon Parker, petitioner, 131 U. S. 221.
Chateaugay Iron Co., petitioner, 128 U. S. 544.
Ex parte Parker, 120 U. S. 737.
Ex parte Morgan, 114 U. S. 174.
Ex parte Burtis, 103 U. S. 238.
Ex parte Railway Co., 101 U. S. 711.
Ex parte Flippin, 94 U. S. 348, 350.
In re Hohorst, petitioner, 150 U. S. 653.

Since it is the proper remedy to compel a court to assume jurisdiction, where it possesses it, it is the proper remedy, and should issue to compel a court to dismiss a case where it does not possess jurisdiction, *if the petitioner has no remedy by appeal, writ of error or writ of prohibition.*

In *Virginia* v. *Rives*, 100 U. S. 313, this court issued a mandamus to the judge of a circuit court, requiring him to deliver two negroes to the State jailer. The State prosecutions against them had been removed into the federal court, which had taken jurisdiction of them without authority. The petition for removal showed on its face that the circuit court had no jurisdiction. The court said that mandamus is a remedy when the case is outside of the exercise of the inferior court's discretion and outside of the jurisdiction of the court; that one of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds.

See also *Ex parte Bradley*, 7 Wall. 364, 375, *et seq.*
Ex parte Newman, 14 Wall. 152, 165.
Ex parte Robinson, 19 Wall. 505.
In re Washington & Georgetown Railroad, 140 U. S. 91.
Gaines v. *Rugg*, 148 U. S. 228.
In re Grossmayer, 177 U. S. 48.

Upon this branch of the case we especially rely on *Virginia* v. *Paul*, 148 U. S. 107.

A judge of a United States Circuit Court without authority of law assumed jurisdiction of an indictment for murder found by a grand jury of the State against a revenue officer. There had been no valid removal to the federal court. Yet the Circuit Court tried the accused, and, after a verdict of guilty, set the verdict aside, granted a new trial, con-

timued the case to the next term, and admitted him to bail on his own recognizance.

The Supreme Court held that a writ of mandamus should issue, commanding the judge to cease the exercise of jurisdiction, and remand the prosecution to the State courts, and that no previous motion to the usurping court was necessary.

This court said that a stronger case for issuing a writ of mandamus could hardly be imagined, since a federal court with no jurisdiction was trying the State's right, and the State had no means of reviewing its action.

HERBERT PARKER,

Attorney-General of Massachusetts.

FREDERICK H. NASH,

Assistant Attorney-General of Massachusetts.

[A.]

DEPARTMENT OF JUSTICE, Nov. 17, 1904.

SIR: — Your letter of July 18 last conveyed to me copy of an instrument purporting to be an agreement between the Commonwealth of Massachusetts and John B. Cotton, Esq., of Washington, D. C. The instrument is executed by Mr. Cotton and by Roger Wolcott, Governor, in behalf of the Commonwealth of Massachusetts. This instrument, if valid, is a contract concerning the prosecution and recovery of a claim against the United States for expenses incurred by the State for the support of its troops engaged in the defence of the United States during the civil war. The contract appointed Mr. Cotton the State's "agent and attorney to present, prosecute and recover the claim" before the proper courts and the Treasury Department "at a compensation of 10 per cent. of the entire sum collected, payable only out of any sums that may be collected hereunder." The claim was presented under this contract, ultimately was adjusted, and an appropriation made by Congress for its payment. Subsequently a warrant for the amount of the appropriation, $1,611,740.85, payable to the Governor of Massachusetts, was drawn and delivered to Mr. Cotton.

On May 4, 1904, Mr. Cotton informed Mr. Parker, Attorney-General of Massachusetts, that the warrant had been delivered to him; and on May 6, 1904, Mr. Parker communicated to Mr. Cotton the wish of the Governor that the warrant should be immediately transmitted to him. On May 12, 1904, Mr. Cotton declined to transmit the warrant unless his fees were paid, claiming a lien upon it for the amount of the fees. On May 14, 1904, Mr. Cotton notified you that he claimed "a lien for compensation upon the sum mentioned in said warrant and also upon the warrant itself, in accordance with my contract and the law in relation thereto." It is understood that the delivery of the warrant to Mr. Cotton was unknown to you, but you say that "it has been the custom of the department for many years to make all warrants payable to the

claimants and deliver them to the regularly authorized attorneys for the claimants. In this way the department protects both the claimants and the attorneys." You then ask "whether the practice is authorized, and particularly whether, in the instance of the Commonwealth of Massachusetts, the delivery of the warrant to Mr. John B. Cotton was authorized under the contract. In other words, was the delivery to Mr. Cotton of the warrant, payable to the order of the Governor of the Commonwealth, a good and legal delivery?" In a supplementary letter, under date of Aug. 16, 1904, you state that you desire my opinion as to the validity of the contract between the Commonwealth and Mr. Cotton. Your letter propounds these additional questions: —

"If you hold that the warrant was improperly delivered to Mr. Cotton, can a duplicate warrant be issued without first recovering the warrant now in the hands of Mr. Cotton, or securing an order of court cancelling it? In other words, is there any authority for the issuance of a duplicate warrant when the original is neither lost nor destroyed?

"If, on the contrary, you hold that the delivery of the warrant to Mr. Cotton was authorized by the contract, may the department in its discretion issue a duplicate without first recovering the warrant regularly issued and legally delivered? In other words, can the department voluntarily divest an attorney of his common-law lien upon the property of his client which comes into his possession by reason of his employment?

"Can the government issue a duplicate warrant without becoming liable to the attorney for the amount of his fee?"

And says, in conclusion, that you desire "an opinion covering every legal question necessarily involved."

Assuming for the present that the contract, apart from any statutory prohibition, would be a valid one between the parties, it is clear that by its terms it constitutes Mr. Cotton the agent and attorney of the Commonwealth of Massachusetts, conferring upon him an authority which would authorize him to receive the claim of the State in money or in a warrant or check for money. Such an authority is clearly included within the powers of a duly constituted attorney. It is suggested, however, that the attorney's power is

limited by section 3477 of the Revised Statutes, which provides, that: —

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same."

Without deciding that a contract for the collection of a claim against the United States — which provides that compensation of the attorney shall be "10 per cent. of the entire sum collected, payable only out of any sums that may be collected hereunder" — is a transfer or assignment of any part or share of the claim, certainly this contract, in which it is agreed that Mr. Cotton should present, prosecute and recover the claim as the agent and attorney of the Commonwealth of Massachusetts, is, as Mr. Cotton contends, "a power of attorney, order or other authority for receiving payment." If this be true, it is pronounced by the statute under discussion to be "absolutely null and void," unless authenticated in a manner not followed in this case.

It is suggested that an exception to the rule established by section 3477 was made by the later act of July 27, 1861, under which this claim arises, which directs the Secretary of the Treasury to pay to the Governor of any State "or to his duly authorized agents" the amount of the claim; but in my opinion the act of 1861 ought not to receive such an interpretation. Agents duly authorized are such

as are authorized in conformity with the provisions of existing law. There is no occasion to resort to the theory of a repeal *pro tanto* by implication of section 3477. By a reasonable interpretation the two enactments are consistent with each other. Courts do not favor the repeal of a statute by implication, but give to each act its full effect wherever it is possible to do so without unwarrantable perversion of the language.

Section 3477 has been interpreted by the Supreme Court in several cases. It has been settled that an assignment by operation of law of a claim against the United States is not prohibited by it (*Erwin* v. *United States*, 97 U. S. 392; *Goodman* v. *Niblack*, 102 U. S. 556; *Price* v. *Forrest*, 173 U. S. 410), and that, where the United States makes payment under an unrevoked assignment or power of attorney void under this statute, the United States can not recover back the money thus paid, nor can the claimant recover again money paid to the attorney and retained by him (*McKnight* v. *U. S.*, 98 U. S. 179; *Bailey* v. *U. S.*, 109 U. S. 432; *Freedman's Saving and Trust Co.* v. *Shepherd*, 127 U. S. 494). And in these cases the court declared that the statute was designed solely for the protection of the United States. But your request for opinion does not present any such questions as were determined by the court in the cases cited. The character of the statute is well described by Mr. Justice Strong in *Spofford* v. *Kirk* (97 U. S. 484), who says (p. 488): —

"It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself."

You state in your letter of July 18 that by the delivery of the warrant to the attorney he is protected against clients who are impecunious or who are exempt by law from civil suits, and Mr. Cotton claims to hold the warrant under a lien for his fees. The motive for delivering the warrant to the attorney, and the effect of

such a delivery, if Mr. Cotton's claim be well founded, is to create an interest in the claim, and is in the teeth of the statute as interpreted by Mr. Justice Strong.

I am therefore clearly of the opinion that the practice of delivering warrants to attorneys, except under the safeguards established by section 3477, is not warranted by law. If it be true that the delivery to the attorney of a warrant payable to the claimant confers upon the attorney the right to hold the warrant under a lien for his fees, the transaction does not protect both the claimant and the attorney. It protects the attorney to the extent of a practical assurance of his fee, but it affords no protection whatever to the client, who is unable to obtain the amount of his claim without first paying the fees, which may be in good faith disputed. There can be no more signal illustration of the importance to the government of following exactly the provisions of the statute than is furnished by the facts of the case submitted by you. Among its other purposes, the statute was designed to relieve the government from conflicting claims arising out of the employment of an agent or attorney. As a result of a departure from its strict provisions, a situation has been created, where the Governor of one of the States demands the payment of a warrant for the payment of the sum appropriated by Congress for the State, while Mr. Cotton, with a warrant for the payment in his hands, claims that the Treasury Department shall not comply with the demand of the Governor.

Mr. Cotton claims that his fees, amounting to $161,000, have been fairly earned, and ought to be paid by the State. The State, upon grounds not submitted to me, appears to deny the right of Mr. Cotton. As a result of these conditions, many questions arise which are propounded to me by your letters, to wit: whether the contract between the Commonwealth of Massachusetts and Mr. Cotton is valid; whether a duplicate warrant may be issued to the Commonwealth of Massachusetts without an order of the court cancelling the warrant now in the hands of Mr. Cotton; and whether the Treasury Department can issue a duplicate warrant, in its discretion, and thus voluntarily divest Mr. Cotton of his lien without becoming responsible to him for the amount of his fee. These questions not only relate to the administration of the Treasury

Department, but affect as well the private rights of the contending parties, not submitted to me by them, on which I have and can have no full information or jurisdiction to determine authoritatively as regards the parties. Under ordinary circumstances these considerations would cause this department to hesitate to render an opinion upon the questions submitted by you, other than that of the legality of the practice of issuing warrants where the conditions prescribed by section 3477 have not been complied with. But the conditions have become intolerable to the parties and embarrassing to the Treasury Department.

Mr. Cotton has the warrant, payable to the order of the Governor, in his hands, and declines to deliver it to the payee unless his fees are concurrently assured to him. The State declines to do this, and demands that, without reference to the warrant already issued to Mr. Cotton, the amount of the appropriation should be paid to the Governor. In the mean time, the money lies idle in the Treasury Department, and no prospects of a settlement of the controversy between the parties is in sight. For these reasons, although the answers given touch upon the rights of private persons over which this department has no jurisdiction, it would seem to be proper for me, so far as I can, to answer the other questions propounded, as questions of law arising in the administration of your department.

1. There are no facts submitted to me from which I can form or express any opinion as to the validity of the contract between the Commonwealth of Massachusetts and Mr. Cotton.

2. The written instrument purporting to be a contract between the Commonwealth of Massachusetts and Mr. Cotton is the only authority appearing under which Mr. Cotton may receive payment of the claim or a delivery of a warrant for payment. You may, for the protection of the government, hold this authority "absolutely null and void," recall your action in issuing the warrant delivered to Mr. Cotton, and take measures, by new warrants or otherwise, to see that the appropriation made by Congress for the Commonwealth of Massachusetts is paid to it.

3. In taking such action, in my opinion, the government does not become liable to the attorney for the amount of his fee.

I beg to suggest the desirability of notifying Mr. Cotton a reasonable time in advance of action. If he shall be advised that any proceedings can be initiated by him for the purpose of contesting his rights in the premises, ample opportunity will be afforded him. On the other hand, if he shall prefer to bring an action for the recovery of his fees against the Commonwealth of Massachusetts, it is a satisfaction to know that the State is responsible financially, and has established a tribunal in which those having claims against it may recover them.

I do not wish to be understood as expressing the opinion that Mr. Cotton is not entitled to recover his fee against the Commonwealth of Massachusetts to the extent agreed upon by any contract which that State has lawfully entered into with him.

Respectfully,

W. H. Moody.

The Secretary of the Treasury.

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FILED
FEB 18 1905
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 15, Original.

EX PARTE: IN THE MATTER OF THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

ANSWER OF THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA TO THE RULE TO SHOW CAUSE.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 14963

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 15, Original.

EX PARTE: IN THE MATTER OF THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The answer of the chief justice and associate justices of the supreme court of the District of Columbia to the rule to show cause issued against them in the above-entitled matter on January 3, 1905, respectfully shows:

1. These respondents admit that John B. Cotton, claiming to be a citizen of the United States and a resident of the District of Columbia, on November 18, 1904, filed a bill in equity in the supreme court of the District of Columbia (being cause No. 25032 in said court) against "Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, governor of the Commonwealth of Massachusetts." A true copy of said bill of complaint is set forth in the petition filed herein by the Commonwealth of Massachusetts as "Exhibit B."

Upon the filing of said bill Mr. Justice Gould, one of the associate justices of this court, granted a rule directed to the defendant Leslie M. Shaw, Secretary of the Treasury, *alone*,

requiring him to show cause on or before the 22d day of November, 1904, why an injunction should not be issued against him, his assistants, subordinates, and clerks, in accordance with the prayer of said bill. This rule directed that a copy of said rule and of the bill of complaint be served upon said Leslie M. Shaw forthwith. On the same day said rule and bill were regularly served upon said Leslie M. Shaw. A copy of said rule is hereto attached, marked "Exhibit "A," and it is prayed that it may be read as a part of this answer.

2. Upon the day said rule was made returnable counsel for said Leslie M. Shaw and for the complainant Cotton announced to Mr. Justice Anderson, one of the associate justices of this court, that it had been agreed between them that, owing to the illness of one of the leading counsel for Mr. Cotton, the hearing on said rule might be postponed to a day to be thereafter agreed upon, reserving all the rights of the parties in the matter. The hearing was accordingly postponed, and, owing to the continued illness of said counsel and to the issuance of the rule to this court, said cause has not yet come on for hearing.

No answer to said rule has been filed by said Leslie M. Shaw, and no other proceedings have been taken in the cause. The complainant Cotton did not request any process or rule to issue against the defendant Bates, and no such process has in fact been issued by this court. All of which will more fully appear by reference to a copy of the docket entries in this cause, marked "Exhibit B" and made a part of this answer.

3. These respondents have no independent knowledge of this litigation or of the questions of fact and law that will or may arise therein other than what they have learned from the allegations of the bill filed by the complainant.

From an examination of said bill, however, they submit, with all deference, that the suit is not nominally against the State of Massachusetts, nor does the complainant seek affirmative relief against the property of that State; but it appears to be an action in the nature of a proceeding *in rem* to establish an attorney's lien under a contract with said State, and also by reason of such professional relation upon a warrant for $1,611,740.85, payable to the order of the governor of Massachusetts, and delivered in due course of business by said Shaw, as Secretary of the Treasury, to the complainant Cotton, as the attorney and agent of said State. Said suit also appears to be an action in the nature of a proceeding *in personam* primarily against the defendant Leslie M. Shaw, as Secretary of the Treasury, to prevent him from defeating or destroying such lien and rights acquired under said contract by issuing to and at the request of the defendant Bates a duplicate warrant, and to prevent said Bates from demanding and receiving such duplicate.

It is therefore respectfully submitted that the suit is a matter of which this court has and ought to take jurisdiction, the complainant alleging that he is a citizen and resident of this District, the warrant upon which the lien is claimed and the principal defendant Shaw all being within this District and subject to the jurisdiction of this court.

4. These respondents further say that no appearance has been entered by the State of Massachusetts in this suit, no process has been prayed or issued against it, and, so far as the respondents are advised, said State has no interest in the controversy and cannot be affected by the result of this litigation. These respondents suggest that until said State appears and asserts any interest which it may have and its immunity from suit in this jurisdiction the extraordinary relief prayed for by said State should not be granted to pre-

vent this court from exercising a jurisdiction over property within its custody and parties subject to its control.

HARRY M. CLABAUGH,
Chief Justice.
JOB BARNARD,
Asso. Justice.
THOS. H. ANDERSON,
Asso. Justice.
ASHLEY M. GOULD,
Asso. Justice.
DAN. THEW WRIGHT,
Asso. Justice.
WENDELL P. STAFFORD,
Asso. Justice.

Test:

JOHN R. YOUNG, *Clerk,*
By W. E. WILLIAMS, *Ass't Clerk.*

[Seal of the Supreme Court of the District of Columbia.]

EXHIBIT "A."

Rule to Show Cause.

Filed November 18, 1904. J. R. Young, Clerk.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

JOHN B. COTTON, *Complainant*, *vs.* LESLIE M. SHAW, *Secretary of the Treasury*, and JOHN L. BATES, *Governor of the Commonwealth of Massachusetts.*	In Equity. No. 25032.

This cause coming on to be heard upon the bill of complaint filed herein, it is this 18th day of November, 1904, ordered that the defendant, Leslie M. Shaw, Secretary of the Treasury, show cause, if any he have, on or before the 22nd day of November, 1904, why an injunction should not be issued restraining and enjoining him, his assistants, subordinates and clerks from cancelling or attempting to cancel upon the books of the Treasury Department or otherwise the Treasury warrant heretofore issued in favor of the governor of the State of Massachusetts and now in the possession of the complainant, John B. Cotton, the same being War Settlement Warrant No. 11,343, dated May 2, 1904, and drawn on the Treasurer of the United States in favor of the governor of the State of Massachusetts, for the sum of one million, six hundred and eleven thousand, seven hundred forty 85/100 dollars ($1,611,740.85), and from drawing, making, signing or issuing to the defendant John L. Bates, governor of the Commonwealth of Massachusetts, or any other person a second or duplicate warrant in settlement or satisfaction of the claim of the State of Massachusetts in the

said bill of complaint set forth or in lieu or place of the said described warrant now outstanding and in possession of said complainant. It is further ordered that a copy of this order and of the bill of complaint be served upon the said Leslie M. Shaw forthwith.

ASHLEY M. GOULD, *Justice.*

Marshal's Return.

Served copy of the within rule to show cause on Leslie M. Shaw, Secretary of the Treasury, personally.

Nov. 18, 1904.

AULICK PALMER, *Marshal.*

[Seal of the Supreme Court of the District of Columbia.]

A true copy.

Test:

J. R. YOUNG, *Clerk,*

By J. W. LATIMER, *Ass't Clerk.*

EXHIBIT "B."

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 25032.

PARTIES.	ACTION.	COMPLAINANT'S SOLICITOR.	COSTS.	
Cotton, John B., *vs.* 1, Shaw, Leslie M., Sec'y Treasury; 2, Bates, John L., Gov. of Mass.	Injunction..	Wm. F. White. Defendants' solicitor : ——— ———.	Clerk ..... Marsl.al ..... Examiner ..... Depositions(—) Auditor.. ..... Printer..... .. Witnesses... .. Solicitor.....	

DATE.	PROCEEDINGS.	CLERK'S FEES.	
1904, Nov. 18	Deposit toward costs by W. F. White	$10.00	
" " "	Bill appearance order to file & exhibits (10)... ...	.....	$3.05
" " "	Spa. to ans. & copy to def't No. 1 only.	.....	2.00
" " "	Certificate to copy bill.....	.. ..	.50
" " "	Injunction, rule as to, ret'ble Nov. 22, 1904. M. 72, p. 120....	.....	.70
" " "	& copy " " " iss'd.....	.....	2.00
" " "	By " " " ret'd served copy on def't No. 1.....	.....	.25
" " 30	Copy of bill issued to gov. of Mass. by Mr. Nash.	.. ....	10.80
" " "	Additional deposit for costs by Mr. Nash, att'y gen. Mass.....	10.80	
" Dec. 6	Spa. to ans. ret'd sum'd No. 1, not to be found No. 2.....	.....	.25

[Seal of the Supreme Court of the District of Columbia.]

A true copy.
Test :

J. R. YOUNG, *Clerk*,
By J. W. LATIMER,
Ass't Clerk.